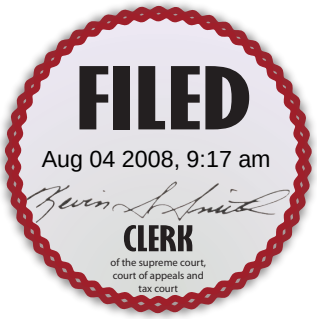

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IN THE
COURT OF APPEALS OF INDIANA

MICHAEL L. COX,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0804-CR-355
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE CIRCUIT COURT
Bruce W. Graham, Temporary Judge
Cause No. 79C01-0610-FA-18

August 4, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Michael Cox appeals his convictions of Child Molesting[1] and Attempted Child Molesting,[2] as Class C felonies.[3] We reverse and remand.

Issue

Cox raises the sole issue of whether the trial court erred by entering judgment of conviction for one offense, when he had been charged with a different offense.

Facts and Procedural History

Cox, age thirty-four, babysat L.L., age four.[4] Cox's conduct was heinous.

The State charged him with three Child Molestation counts: Child Molestation, as a Class A felony, Attempted Child Molestation, as a Class A felony, and Child Molestation, as a Class C felony.

Immediately after the close of the evidence in the bench trial, the trial court asked counsel for argument "about conforming the evidence to the charges." Appendix at 226. The trial court took counts I and II under advisement and later that day entered judgment of conviction on each – as Class C felonies.

Cox now appeals.

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[1] Ind. Code § 35-42-4-3.

[2] Id., and Ind. Code § 35-41-5-1.

[3] Cox does not challenge his third conviction – Child Molestation, as a Class C felony – for which he received a seven-year term of imprisonment, to be fully executed. Appellant's Brief at 3.

[4] There is no dispute regarding the ages of Cox and the victim.

Discussion and Decision

Cox challenges two of his convictions, arguing that he was convicted of two crimes for which he was not charged. The State suggests that Cox waived his opportunity for appellate review on this issue during closing argument. To the contrary, Cox's attorney argued precisely this issue: "unless the State moves to amend in . . . some kind of timely fashion [] they're bound by the allegations of their information." Id. at 230-31.

Child Molesting is a Class A felony if a person performs or submits to deviate sexual conduct with a child. Ind. Code § 35-42-4-3(a). In Indiana, "deviate sexual conduct" means an act involving either "a sex organ of one person and the mouth or anus of another person" or "the penetration of the sex organ or anus of a person by an object." Ind. Code § 35-41-1-9. Child Molesting is a Class C felony if the adult "performs or submits to any fondling or touching, of either the child or the older person, with intent to arouse or to satisfy the sexual desires of either the child or the older person." I.C. § 35-42-4-3(b).

In comparing these two subsections, our Supreme Court concluded that "[t]he language of subsections (a) and (b) [is] strikingly different." D'Paffo v. State, 778 N.E.2d 798, 800 (Ind. 2002). The D'Paffo Court held that "intent to arouse or satisfy sexual desires" is not an element of subsection (a). Id. at 801. And by plain statutory language, "deviate sexual conduct" is not an element of subsection (b), which addresses "fondling or touching." Thus, each of the two levels of Child Molesting has one mutually exclusive element: "deviate sexual conduct" for a Class A felony and "touching with an intent to arouse" for a Class C felony. As a result, the Class C version of the offense entitled Child Molesting is not

a lesser included offense of Child Molesting, as a Class A felony. See Brooks v. State, 526 N.E.2d 1171, 1172 (Ind. 1988).

The State charged Cox with two Class A felonies: Child Molesting and Attempted Child Molesting – or effectively, deviate sexual conduct and attempted deviate sexual conduct. In the first count, the State charged that Cox "did perform or submit to sexual deviate conduct, to wit: an act involving the penetration of the anus of [L.L.] by an object, to wit: a finger." App. at 6. In the second, the State alleged that Cox

> did attempt to commit the crime of child molesting by engaging in conduct which constituted a substantial step towards the commission of the crime of child molesting by knowing or intentionally attempting to cause [L.L.] . . . to perform or submit to deviate sexual conduct, to wit: an act involving the mouth of [L.L.] and the sex organ of [Cox] by attempting to place his penis in or near the mouth of [L.L.] and/or ejaculating on the face or mouth of [L.L.].

Id. at 7. Neither charge referenced fondling or touching with an "intent to arouse or to satisfy the sexual desires of either the child or the older person." I.C. § 35-42-4-3(b) (Class C felony Child Molesting).

After the trial court's inquiry as to the relationship of the two offenses, the State was explicit that it was standing by its allegations, as charged. "He could have been charged with multiple C felonies. . . . We only charged him with one." App. at 230. The trial court entered judgments of conviction for Child Molesting as Class C felonies (touching with intent to arouse), even though Cox had been charged with Child Molesting as Class A felonies (deviate sexual conduct). Thus, Cox was convicted of one crime while having been charged with another.

Twenty years ago, a unanimous Indiana Supreme Court addressed a nearly identical

situation with the same two crimes. In Brooks v. State, Brooks was charged with Molesting by performing deviate sexual conduct. Brooks, 526 N.E.2d 1171. The trial court instructed the jury upon what it considered to be the lesser included offense of Molesting by touching with intent to satisfy sexual desires. As noted above, the Brooks Court first concluded that the conviction was not a lesser included offense of the charge. Id. at 1172. The Court then reversed the conviction, reasoning that "[t]here is no authority in the court to amend the charge on his own motion or to initiate additional charges shown by the proof, as was done at this trial." Id.[5] Upon this authority, the convictions on counts I and II are void.

Meanwhile, the trial court made no finding on the questions actually presented by counts I and II: whether Child Molesting and Attempted Child Molesting, as Class A felonies, had been proved beyond a reasonable doubt. Neither D'Paffo nor Brooks is instructive on how to proceed here, as each was tried to a jury.[6] Nonetheless, our Supreme Court recently addressed a similar procedural issue in Villas West II of Willowridge Homeowners Ass'n v. McGlothin, 885 N.E.2d 1274, 1285 (Ind. 2008), petition for reh'g filed, (June 10, 2008). In that case, a homeowner brought a fair-housing claim based upon two theories: disparate treatment and intentional discrimination. After a bench trial, the trial court found for the homeowner on the basis of disparate treatment, but its findings as to the association's intent were ambiguous. The Villas West Court reversed the disparate-treatment

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[5] The State fails to cite or present argument regarding Brooks v. State, argued extensively by Cox.

[6] Furthermore, in D'Paffo, the defendant challenged a jury instruction because it did not require a showing of intent to arouse for Child Molesting as a Class A felony. Concluding that intent to arouse was an element of a Class C felony, but not a Class A felony, the D'Paffo Court affirmed the Class A felony conviction. D'Paffo,

judgment and remanded for "further evidence and findings" regarding the intentional-discrimination claim. Id.

Here, Cox admitted after the close of the evidence that there was some evidence of deviate sexual conduct. "Now I admit that in the Hartford House interview [admitted as State's Exhibit 1] . . . [L.L.] did talk about a finger in an anus during the interview, so I'm not saying that there is no evidence from which the court could find that." App. at 232. As this case was tried to the bench, but no judgment has yet been entered, it is feasible to remand for a finding and judgment on counts I and II, Child Molesting and Attempted Child Molesting, as Class A felonies, based solely upon the evidence presented at the bench trial.

Conclusion

The judgments as Class C felonies on counts I and II are void.

Reversed and remanded for a finding and judgment of acquittal or conviction on counts I and II, Child Molesting and Attempted Child Molesting, as Class A felonies.

FRIEDLANDER, J., and KIRSCH, J., concur.

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778 N.E.2d at 801. In Brooks, the trial court granted the defendant's motion for judgment on the evidence, concluding that no evidence supported a finding of deviate sexual conduct. Brooks, 526 N.E.2d at 1172.